



American Civil Liberties Union
of Montana

Power Block, Level 3
PO Box 1317
Helena, Montana 59624
406-443-8590
www.aclumontana.org

EXHIBIT 11
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S/H

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RE: SB 554

My name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana. Today I stand in opposition to HB 554.

This bill will undoubtedly increase costs to the state and to counties for incarceration.

This bill will significantly increase costs to the state and the counties in having state and county officials and the courts make immigration determinations at bail hearings.

This bill is unnecessary.

This bill is likely to result in racial and ethnic profiling by state and county officials charged with making decisions about bail.

Even setting aside these public policy concerns, the bill is constitutionally suspect for at least the following reasons.

- a. Due Process: This bill raises serious substantive due process concerns by punishing individuals for their presumed immigration status who would otherwise be deemed eligible for release on bond or other conditions. Under the Due Process Clause, a criminal defendant may not be punished without a prior adjudication of guilt, and pretrial detention may not be punitive. Moreover, the Federal Government has an exclusive power to punish persons for immigration violations. Punishing immigration violations- real or perceived- is not a legitimate function of the State of Montana. It also raises due process concerns in that immigration status is a complex issue under federal statutes and regulations, and is determined before a federal immigration judge with myriad procedural protections—including briefing, evidentiary hearings, and the right to counsel—required under federal immigration law. This bill offers none of these protections in having state officials determine an individual's immigration status.
- b. Fifth Amendment Right Against Self-Incrimination: To the extent that this bill requires state officials and the courts to interrogate individuals about their immigration and nationality status, those interrogations may elicit incriminating information that violates the individuals' rights against self-incrimination under the Fifth Amendment.

- c. Eighth Amendment Right Against Excessive Bail: In establishing denial of bail based upon presumed immigration status, this bill also impinges on the Eighth Amendment's guarantee that "[e]xcessive bail shall not be required." Under the excessive bail clause, the Supreme Court has held that a court may not impose bail or pretrial conditions that punish criminal defendants for past acts without regard to whether an individual poses an unacceptable flight risk.
- d. Supremacy Clause: As this bill requires state courts and officials to make independent determinations about an individual's immigration status, it is likely to be pre-empted under the Supremacy Clause (U.S. Constitution Article V) because it is inconsistent with the statutory and regulatory system of federal immigration law, conflicts with federal immigration law, and invades the exclusive province of the federal government to regulate and enforce federal immigration laws.

Regardless of whether or not it is a rebuttable presumption, Section 3 makes a false presumption, that an inmate's "immigration status has been verified pursuant to subsection (2) to be an alien who is not lawfully present in the United States is at risk of flight".

The U.S. department of homeland security is not authorized to determine whether or not the inmate is lawfully in the U.S. -- only a federal immigration judge can make that determination.

A federal immigration "detainer" in no way automatically means that an individual is undocumented or unlawfully present in the US. In most cases, in fact, at the time ICE places a "hold" on selected inmates, no immigration judge has yet determined whether or not these individuals will be deported. They have not yet had their day in immigration court. In most cases, moreover, no judge has even issued a warrant for the arrest of the person on immigration grounds.

The presumption that all inmates with ICE "holds" are undocumented is just plain wrong. Prolonged detention in state or county custody based solely on the existence of an ICE hold raises serious constitutional concerns about due process and equal protection under the law. These constitutional guarantees apply to all persons in this country, not just to U.S. citizens.